

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

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PJS

75-1203

To be argued by
THOMAS J. CONCANNON

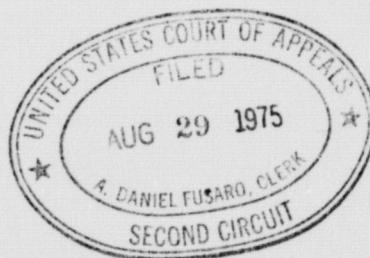
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Appellee, :
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-against- :
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ELVA MORALES, :
:
Appellant. :
:
-----x

Docket No. 75-1203

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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The Government's responses to the arguments that the indictment lacked specificity, thus making it impossible to ascertain the theory of guilt upon which the grand jury indicted and resulting in prejudice to appellant Morales, will be answered seriatim:

1. The Government contends that there was no change in its theory of guilt because it had, throughout the proceedings, maintained that the conspiracy between appellant Morales and Gotes -- the conspiracy presented to the jury --

was part of the larger Chilean conspiracy which had been alleged in the first indictment. However, this reasoning was rejected by Judge Frankel in his comments after all the evidence had been presented:

If she's in a conspiracy, she's got to be in a conspiracy with Lena or nobody. There is no other conspirator and the people unknown are unknown to this record, including the good looking young woman.

(193).

Judge Frankel's finding rejected any notion that appellant participated in the Chilean conspiracy. Thus, he found that the Morales-Gotes conspiracy was a separate and distinct affair from the one announced by the prosecutor in his opening as the one charged in the indictment.* If it were otherwise, appellant could have been guilty of conspiring with the suppliers in Chile, including Carmen Miranda, on the often-applied theory that conspirators unknown to each other may nonetheless belong to the same conspiracy.

*Indeed, the Assistant U.S. Attorney explained in his opening that the Chilean conspiracy was the one charged in the indictment:

... Basically the evidence will show that in 1974, which is last year, perhaps a little earlier, there existed in New York and elsewhere an arrangement, an operation by which quantities of cocaine were brought up from Chile in South America to New York City and then were distributed to various people in New York City.

And in particular you'll hear that there is a woman whose name was Lena Gotes

Judge Frankel's ruling also explicitly rejected the Government's theory that other conspirators were appellant's alleged customers (191-193) or the young woman who accompanied appellant (193). Thus, the ultimate conspiracy which went to the jury was premised on proof of a separate and independent agreement between Gotes and appellant.

2. The Government argues that appellant Morales was not prejudiced by the court's selection of a limited conspiracy for presentation to the jurors.* It asserts that there was no prejudice because appellant was not surprised by the evidence that Gotes was a conspirator of appellant's, and this, says the Government, was demonstrated by defense counsel's acknowledgment that Gotes was an alleged co-conspirator.

(Footnote continued from the previous page)

who had a clothing store up on 173rd Street and St. Nicholas Avenue, and she was really the New York communications center, the New York hub of this arrangement, and her role was that she knew suppliers of cocaine down there. She had arranged to have this stuff sent up to New York and she would put the suppliers in Chile in contact with buyers in New York. And, as you can see, her role already is an accommodator, an intermediary.

(12-13).

*For the same reason, the Government argues that the indictment was not defective.

However, the Government misapprehends the nature of the prejudice that occurred in this case. The Government's quote of defense counsel is only an excerpt. What he said, in full, was that while he knew Gotes was charged as a co-conspirator, as the case had developed he had no idea who the other alleged co-conspirators were (193), and thus he could not attempt to limit the evidence introduced.* The prejudice which resulted to appellant Morales was the introduction of evidence relating to the regular and schematic importation of large quantities of very pure cocaine and heroin into the United States from Chile (24, 26, 80, 81, 82). Such evidence was unnecessary to show that appellant Morales conspired with Gotes to possess drugs with intent to distribute, and was highly prejudicial. Counsel sought to avoid the prejudice which accrued to appellant by the introduction of this evidence by requesting the striking of evidence of Gotes' involvement with drugs after the decision not to sell to appellant (200). The court refused to strike the evidence because its admission had not been objected to (200-201). However, the failure by counsel to object was symptomatic of

*The Government claims that counsel's statement made at the very beginning of the first witness' testimony that the indictment charged a "fairly specific conspiracy involving fairly specific people" shows he knew the Government's theory of guilt. However, this statement related to the Government's attempts to introduce through Gotes evidence of the relationship between Gotes and appellant Morales at a time contended by counsel to be before the conspiracy charged in the indictment.

the difficulties appellant argues existed here. Until the Government had presented its case, counsel believed that the theory of the Government, to be confirmed by the evidence to be introduced, would go to establishing appellant's participation in the Chilean conspiracy. The evidence that counsel wanted stricken was not relevant to showing the Morales-Gotes conspiracy which the court found was the only one shown by the evidence. Accordingly, counsel was denied even this limited means of protecting his client from the results of the broad language of the indictment which potentially included within its umbrella several conspiracies.*

Moreover, as was indicated in appellant's main brief, prejudice resulted because it is unclear whether the grand jury indicted appellant on a theory of guilt which the court later rejected. Further, it is unknown whether the evidence before the grand jury resulted in an indictment alleging a crime which had the potential of including far more criminal activity than that shown to involve appellant. The Government argues that United States v. Tramunti, 513 F.2d 1087, 1107-1108 (2d Cir. 1975), does not require acquittal where

*Indeed, counsel's failure to request a second bill of particulars to cover the superceding indictment is similarly explicable. When first seeing the indictment, he could have well believed that the minutes of the first trial, as well as the bill of particulars of that trial, provided all the information he needed about the new case. However, it was only after the presentation of the Government's evidence that defense counsel became concerned that the broad Chilean conspiracy was not the one which had been proven, and he so stated.

the jury hears evidence of conspiracies not charged in the indictment. Tramunti does not apply to cases involving the grand jury where the issue is what conspiracy formed the basis of the charges set forth in the indictment. Rather, the applicable case is United States v. Silverman, 430 F.2d 106, 110 (2d Cir. 1970), which prohibits the prosecutor from modifying the theory and evidence upon which the indictment is based.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant Morales, the judgment should be reversed and the indictment dismissed.

Respectfully submitted,

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